Aerodarat Services Sdn Bhd v Lawerance Raj a/l Arrulsamy & Anor

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO WA-25–26–02 OF 2023
AMARJEET SINGH J
19 MARCH 2025

Administrative Law — Judicial review — Application for — Prolonged absenteeism due to medical condition and illness — Dismissal of employee on grounds that absence of employee was with intention not to come to work and indicating unwillingness to perform contractual duties and obligations — Findings of unfair dismissal by Industrial Court — Whether Industrial Court correctly found ingredients of charge not proved by company — Whether judicial review warranted

The claimant commenced employment with the company in 2016, with the post of Duty Manager, Passenger Services. The claimant's job function required him to walk around and was not sedentary. The attendance records, since January 2018, revealed that the claimant had gone on an extensive amount of annual and illness leaves. In 2019, the records showed that the claimant's rate of absence was 72.05% (based on 365 days). In 2020, the rate of absence further escalated on account of medical reasons. From January 2020 until March 2020, the claimant's absence was 100%. This resulted in the company issuing a show cause letter against the claimant alleging that the claimant had the intention not to come to work and was not willing to perform his contractual duties and obligations. In response to the show cause letter, the claimant denied the company's allegation against the claimant and contended that the company was very much aware of his prolonged illness since July 2018 and that the claimant was recovering post-surgery after a total knee replacement operation on 1 July 2019. In finding that the response of the claimant to be unsatisfactory, the company proceeded to dismiss the claimant. As the claimant's appeal against his dismissal to the company was unsuccessful, the claimant lodged a complaint against his dismissal with the Industrial Relations Department which was eventually referred to the Industrial Court. The Industrial Court, inter alia, held that the company failed to discharge the burden of proving that the claimant had indicated his unwillingness to perform his duties under his contract of employment. Hence, the basis for dismissing the claimant could not stick, and the dismissal of the claimant was without just cause and excuse. Aggrieved, the company filed the present application for judicial review against the decision of the Industrial Court on the ground that the Industrial Court: (a) failed to take into consideration that the excessive rate of absenteeism of the claimant showed that the claimant had failed to

undertake his duties and responsibilities under the contract of employment; (b) failed to take into consideration the evidence that the claimant's duties did not contribute to his knee condition; (c) erred in law when holding that the doctrine of frustration of contract was not applicable to the present case; and (d) erred in law in holding there were statements which contradicted the company's contention that it was not aware when the claimant would return to work.

Held, dismissing the application with costs:

(1) Mere excessive medical leave and other leave did not prove the charge of misconduct the claimant was charged with. Excessive medical leave was one ingredient of the charge. The second ingredient was the sting of the charge, namely, the intention not to come to work and indicating an unwillingness to perform the claimant's duties under the contract of employment. The second ingredient was the essence of the charge. The burden was on the employer to establish this second ingredient. It could not be deemed from mere absenteeism arising from excessive medical leave. The failure to prove the second ingredient would not establish the misconduct the claimant was charged with (see paras 21 & 24).

(2) The allegation of whether the claimant's knee condition was aggravated by the claimant's job function as Duty Manager — Passenger Services was irrelevant to the issue before the Industrial Court. The issue before the Industrial Court was whether the claimant had an intention not to come to work, thereby indicating unwillingness to perform his contractual duties and obligations as an employee. Prima facie evidence indicated that the claimant was indeed naturally required to walk a lot in the performance of his duty as Duty Manager — Passenger Services and in the process had his knee condition aggravated. The company failed to accord the claimant with light duty despite being able in terms of resources to do so (see paras 37–38).

(3) The sting of the charge was its second ingredient, ie, whether there was an intention not to come to work. The instant case had nothing to do with the allegation of the contract being frustrated. The issue of frustration was a stranger to the charge. The company was not permitted to raise a matter which was not the reason for dismissing the employee (see paras 40–41).

(4) The letter of dismissal specified the finding of misconduct as per the charge as the reason for the dismissal of the claimant. Where the contract of employment was frustrated, the contract was terminated by operation of law, and there was no issue of dismissal. Since the doctrine of frustration was not the reason in the letter of dismissal, the contention

that the Industrial Court erred in law by failing to consider that the contract of employment was frustrated was devoid of merit (see paras 43–45).

(5) The company was aware of the latest medical condition of the claimant but did nothing to find out when the claimant could come back to work. The fault lay entirely on the company for failing to ascertain when the applicant would be fit to return to work (see para 48).

[Bahasa Malaysia summary

Pemohon mula bekerja dengan syarikat tersebut pada 2016 dengan jawatan sebagai Pengurus Bertugas, Perkhidmatan Penumpang. Skop kerja penuntut adalah memantau persekitaran dan tidak hanya duduk di meja pejabat. Rekod kehadirannya sejak Januari 2018 menunjukkan bahawa pemohon telah mengambil sebahagian besar cuti tahunan dan cuti sakit. Pada tahun 2019, rekod menunjukkan bahawa kadar ketidakhadiran pemohon adalah 72.05% (berdasarkan 365 hari). Pada tahun 2020, kadar ketidakhadiran meningkat lagi atas sebab rawatan penyakit. Dari Januari 2020 hingga Mac 2020, ketidakhadiran pemohon adalah 100%. Hal ini menyebabkan syarikat mengeluarkan surat tunjuk sebab terhadap pemohon yang mendakwa bahawa pemohon tidak berkeinginan untuk bekerja dan tidak bersedia untuk melaksanakan tugas dan kewajipan kontraknya. Sebagai jawapan kepada surat tunjuk sebab tersebut, pemohon menafikan dakwaan syarikat terhadap pemohon dan menyatakan bahawa syarikat tersebut mengetahui penyakitnya yang berpanjangan sejak Julai 2018 dan pemohon telah pulih selepas pembedahan lutut pada 1 Julai 2019. Setelah mendapati alasan pemohon tidak memuaskan, syarikat tersebut meneruskan untuk memberhentikan pemohon. Oleh kerana rayuan pemohon terhadap syarikat tersebut untuk pemberhentian kerjanya itu tidak berjaya, pemohon membuat aduan terhadap pemecatannya kepada Jabatan Perhubungan Perusahaan yang kemudiannya dirujuk ke Mahkamah Perusahaan. Mahkamah Perusahaan, antara lain, memutuskan bahawa syarikat tersebut gagal melepaskan beban pembuktian bahawa pemohon telah menunjukkan keengganannya untuk melaksanakan tugasnya di bawah kontrak pekerjaannya. Oleh itu, tiada asas untuk memberhentikan pemohon dan pemberhentian pemohon adalah tanpa sebab dan alasan yang munasabah. Terkilan, syarikat tersebut memfailkan permohonan semakan kehakiman terhadap keputusan Mahkamah Perusahaan atas alasan bahawa Mahkamah Perusahaan: (a) gagal mengambil kira bahawa kadar ketidakhadiran yang berlebihan oleh pemohon yang menunjukkan bahawa pemohon telah gagal menjalankan tugas dan tanggungjawabnya menurut kontrak pekerjaan; (b) gagal mengambil kira keterangan bahawa tugas pemohon tidak menyumbang kepada keadaan lututnya; (c) terkhilaf dalam undang-undang apabila memutuskan bahawa doktrin kekecewaan kontrak tidak terpakai untuk kes ini; dan (d) terkhilaf dalam undang-undang ketika memutuskan bahawa terdapat kenyataan yang bercanggah dengan hujahan

syarikat bahawa mereka tidak mengetahui bila pemohon akan kembali bekerja.

Diputuskan, menolak permohonan dengan kos:

(1) Cuti sakit yang berlebihan dan cuti lain yang diambil tidak membuktikan tuduhan salah laku pemohon. Cuti sakit yang berlebihan adalah salah satu elemen utama pertuduhan. Elemen kedua yang penting di dalam pertuduhan, iaitu niat untuk tidak datang bekerja dan keengganan untuk melaksanakan tugas pemohon menurut kontrak pekerjaan. Elemen kedua ini ialah intipati penting pertuduhan tersebut. Beban pembuktian terletak pada majikan untuk membuktikan elemen kedua ini dan tidak boleh bergantung kepada ketidakhadiran semata-mata akibat daripada pengambilan cuti sakit yang berlebihan. Kegagalan untuk membuktikan elemen kedua tidak membuktikan salah laku yang didakwa oleh pemohon (lihat perenggan 21 & 24).

(2) Tuduhan sama ada keadaan lutut pemohon diburukkan lagi oleh skop kerja pemohon sebagai Pengurus Bertugas, Perkhidmatan Penumpang adalah tidak relevan di hadapan Mahkamah Perusahaan. Isu di hadapan Mahkamah Perusahaan adalah sama ada pemohon mempunyai niat untuk tidak datang bekerja dengan menunjukkan keengganan untuk melaksanakan tugas dan kewajipan kontraknya sebagai pekerja. Keterangan prima facie menunjukkan bahawa pemohon sememangnya dikehendaki untuk selalu berjalan ketika melaksanakan tugasnya sebagai Pengurus Bertugas, Perkhidmatan Penumpang dan menyebabkan keadaan lututnya bertambah teruk. Syarikat tersebut gagal memberikan tugas yang lebih ringan kepada pemohon walaupun berkemampuan dari segi sumber untuk berbuat demikian (lihat perenggan 37–38).

(3) Perkara penting pertuduhan itu adalah elemen keduanya, iaitu, sama ada ada terdapat niat untuk tidak datang bekerja. Kes ini tiada kaitan dengan doktrin kekecewaan kontrak yang merupakan perkara asing. Syarikat tersebut tidak dibenarkan membangkitkan perkara yang bukan merupakan alasan untuk memberhentikan pekerja (lihat perenggan 40–41).

(4) Surat pemberhentian memperincikan salah laku di dalam pertuduhan sebagai alasan pemecatan pemohon. Apabila terdapat kekecewaan kontrak di dalam kontrak pekerjaan, kontrak akan ditamatkan dengan penguatkuasaan undang-undang dan oleh itu tidak akan ada isu pemberhentian. Oleh kerana doktrin kekecewaan bukanlah alasan dalam surat pemecatan, alasan bahawa Mahkamah Perusahaan terkhilaf dalam undang-undang dengan gagal mempertimbangkan bahawa kontrak pekerjaan itu dikecewakan adalah tidak mempunyai merit (lihat perenggan 43–45).

(5) Syarikat tersebut menyedari keadaan kesihatan terkini pemohon tetapi

tidak melakukan sebarang tindakan untuk mengetahui bila pemohon boleh kembali bekerja. Kesalahan terletak sepenuhnya pada syarikat tersebut kerana gagal memastikan bila pemohon sesuai untuk kembali bekerja (lihat perenggan 48).]

Cases referred to

Goon Kwee Phoy v J&P Coats (M) Bhd [1981] 2 MLJ 129; [1981] CLJU 30, FC (refd)
International Sports Co Ltd v Thomson [1980] IRLR 340 (distd)
Malaysia Smelting Corp Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Peleboran Logam, Butterworth [1992] MLJU 108; [1992] 2 ILR 49, HC (refd)
Maritime Intelligence Sdn Bhd v Tan Ah Gek [2021] MLJU 2189; [2021] 10 CLJ 663, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Rolls Royce Ltd v Walpole [1980] IRLR 343 (distd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

Wong Kian Jun (Shearn Delamore & Co) for the applicant.
Lourdes Abishegam (Zahir Jeya & Zainal) for the respondent.

Amarjeet Singh J:

INTRODUCTION

[1] On 29 July 2024, I dismissed the judicial review application brought by Aerodarat Services Sdn Bhd ('the company') to quash by an order of certiorari the award dated 14 November 2022 by Industrial Court, which found the claimant, Lawerance Raj a/l Arrulsamy, had been dismissed without just cause and excuse.

[2] This judgment contains the reasons for my decision.

BACKGROUND

[3] On 1 January 2016, the claimant commenced employment with the company, and on 1 September 2016, he attended an interview and was successful for the post of Duty Manager, Passenger Services. It was not disputed that the claimant's job function required him to walk around and was not sedentary.

[4] The attendance records, since January 2018, revealed that the claimant had gone on an extensive amount of annual and illness leave. In 2019, the

claimant's absence from work was further exacerbated. The records showed that the claimant's rate of absence in 2019 was 72.05% (based on 365 days). In 2020, the rate of absence further escalated on account of medical reasons. From January 2020 until March 2020, his absence was 100%.

[5] The company was of the view that the claimant had persistently taken excessive medical leave, hospitalisation leave, prolonged illness leave, and/or other leave between January 2018 and February 2020 with the intention not to come to work. To the company, this indicated an unwillingness to perform his contractual duties and obligations. As a result, the company issued a show cause letter dated 6 April 2020, requiring the claimant to respond to the following charge:

> That you as an employee of the Company, had persistently taken excessive medical leave/hospitalisation leave/prolonged illness leave and/or other leave between January 2018 and February 2020 with the intention not to come to work and indicating unwillingness to perform your contractual duties and obligation which is contrary to the expected performance as per your contract of employment with the Company.

[6] The claimant's absence from January 2018 until March 2020 was particularised in detail and can be summarised as follows:

(a) Year 2018 absent for 216 days (59.18%);

(b) Year 2019 absent for 263 days (72.05%); and

(c) January until March 2020 absent for 81 days (100%).

[7] The responded denied the charge in a letter dated 10 April 2020 and stated that the company was very much aware of his prolonged illness since July 2018 and that the claimant was recovering post-surgery after a total knee replacement operation on 1 July 2019. Of importance is the claimant's statement that:

> I am definitely returning back to work when I am deemed fit by the doctors. As just mentioned above, recovering from prolonged illness takes time, and I have been instructed by the doctors to do physiotherapy, pool therapy, and gym therapy. This is to retain balance on my leg and to be able to walk again without pain support or difficulty.
>
> I need to make sure that I am fully recovered ... and therefore to return to work when my knee has completely healed.

[8] The company found the response unsatisfactory and, in a letter dated 17 April 2020, dismissed the claimant on the said charge. The relevant part of the dismissal letter state for which the claimant was dismissed was in the following terms:

> The act of persistently taking excessive medical and/or other leave with the intention not to come to work and indicating your unwillingness to perform your duties under the contract of employment is a serious misconduct on your part. The excessive medical and/or other leave taken by you resulted in a high rate of absence since 2018 to date, whereby in 2018, your rate of absence was 59.18%, which increased to 72.05% in 2019 and culminated in a 100% rate of absence in 2020. The foregoing does not reflect on the commitment and standards expected from you as an employee of the company.

[9] The claimant was allowed to appeal the dismissal. He did, in a letter dated 28 April 2020, stated that he was dismissed while still on medical leave post-surgery and ended his appeal as follows:

> I am appealing to you to give me an opportunity to return to work and resume work after being fully recovered post-surgery.

[10] The company dismissed the appeal, which was conveyed in a letter dated 13 May 2020. The claimant lodged a complaint against his dismissal with the Industrial Relations Department. The dispute was referred to the Industrial Court for adjudication.

DECISION OF THE INDUSTRIAL COURT

[11] The Industrial Court considered the claimant's medical condition, which was as follows:

(a) sometime in 2016, the company's panel of doctors recommended that the claimant be put on light duty due to an injury to his right knee;

(b) in an email dated 15 October 2016, the company refused the claimant's request for light duty and advised the claimant to take time to rest at home in Auckland, New Zealand;

(c) on returning to work, the claimant's condition worsened, and on 22 November 2016, he expressed his difficulties to the company;

(d) the claimant then underwent an artho debridement surgery, whereby the company on 7 July 2018 acknowledged the claimant's medical condition to be treated as a prolonged illness; and

(e) on 1 July 2019, the claimant underwent total knee replacement surgery and was on post-surgery medical leave during the issuance of the show cause on 6 April 2020.

[12] The issue before the Industrial Court was whether the claimant was dismissed with or without just cause and excuse. The Industrial Court held that the dismissal was without just cause and excuse.

[13] The chairman of the Industrial Court ('the learned chairman') who adjudicated the matter identified the sting of the charge against the claimant as not a prolonged absence from work *but an intent not to come to work and an unwillingness to perform his contract of employment*. Such an act amounted to 'misconduct', a breach of which, by accepted practice and standards of fairness and justice, the employer should not be bound to continue the employment and dismiss the employee.

[14] The award of the learned chairman is revealed as follows:

(a) the company's case was not accepted by the learned chairman. The company's case rested on the deeming contention that by the taking of excessive medical leave, although approved by the company and certified by medical doctors including Dr Pasupathy a/l Sivapragasam, a Consultant Orthopaedic Surgeon with Pantai Hospital Kuala Lumpur ('CLW2') and as provided for in the Company's Handbook, the claimant was deemed to have the intention not to come to work and, in the circumstances, committed the misconduct of unwillingness to perform his contractual duties and obligation;

(b) the learned chairman accepted the medical testimony given CLW2. The testimony was to the effect that the claimant's condition could be traced back to a motor vehicle accident in 1987, which caused him lower back pain and difficulty in walking. CLW2 had recommended to the company in a letter on 3 November 2017 that the claimant be given light duty and not to walk around. In the letter, CLW2 stated that the claimant's neck and right knee pain had started in 1987;

(c) the learned chairman accepted CLW2 testimony that on 1 July 2019, the claimant underwent a right knee replacement operation and after which as of 25 March 2022, the right knee was fully functional and the claimant was fully fit to resume his duties as Duty Manager, Passenger Services;

(d) the learned chairman did not accept the testimony on behalf of the company that the company did not know at the time of dismissal that the claimant had recovered and could return to work. The learned chairman said that the company knew and was fully aware, from the contents of the email dated 15 October 2016, of the claimant's knee condition (see para 50 of the award);

(e) the learned chairman said that the claimant was entitled to 24 months (728 days) of prolonged illness leave according to the Company's Handbook. The claimant's leave started from 7 July 2018, which was approved by the company, and he was on leave until March 2020, whereby he had taken only 384 days of prolonged illness; and

(f) the learned chairman held that the doctrine of frustration was not

applicable as the claimant had recovered and was ready to return to work. A

[15] The learned chairman held that the company failed to discharge the burden of proving that the claimant had indicated his unwillingness to perform his duties under his contract of employment. The basis for dismissing the claimant could not stick, and the dismissal was held without just cause and excuse. B

GROUNDS OF REVIEW

[16] In its written submissions (applicant's written submissions), the company contended that the learned chairman had committed the following errors of law that would warrant the award being quashed: C

(a) failed to take into consideration that the excessive rate of absenteeism of the claimant showed that the claimant had failed to undertake his duties and responsibilities under the contract of employment (paras 23–41); D

(b) failed to take into consideration the evidence that the claimant's duties did not contribute to his knee condition (paras 42–46);

(c) erred in law when holding that the doctrine of frustration of contract was not applicable to the present case (paras 47–52 and paras 55–63); and E

(d) learned chairman erred in law in holding there were statements which contradicted the company's contention that it was not aware when the claimant would return to work (paras 53–54) F

DECISION OF THE COURT

[17] The principles of judicial review relating to decisions of statutory tribunals are trite and well-settled. It suffices to refer to the often-quoted case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748. The reviewing court will interfere if the statutory tribunal committed the following errors of law: G

(a) the decision the tribunal arrived at is a decision which no reasonable tribunal similarly circumstanced would have arrived at; H

(b) the decision was arrived at by failing to take into account relevant considerations or by taking into account irrelevant considerations;

(c) the tribunal had asked itself the wrong questions; or I

(d) the tribunal had misconstrued the terms of the statutory provision or agreement or misapplies or misstated a principle of general law.

[18] The reviewing court is not permitted to disturb findings of fact except

on the following limited grounds: (a) where the tribunal relied on an erroneous factual conclusion; or (b) where there is no evidence to support a conclusion (see *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629).

[19] This court then addressed each of the complaints.

The excessive medical and other leave

[20] The learned chairman's finding on the charge preferred against the claimant appears as follows in his award:

> [44] It is trite that when a dismissal is challenged and brought to the industrial court for determination, the onus of prove that an employee was dismissed with just cause or excuse in so far as s 20 of the Act is concerned rests squarely with the employer.
>
> [45] Having the above cardinal principle in mind, this court found it difficult to comprehend that by the mere taking of an excessive amount of medical, prolonged illness and/or any other leave alone, the claimant can be safely deemed to have indicated his unwillingness to perform his duties under his contract of service. It would be a total contravention of the fundamental principle that the employer be dispensed with the duty to prove, how in the circumstances of the case, that owing to the excessive amount of medical, prolonged illness and/or any other leave, the claimant was deemed to have indicated his unwillingness to perform his duties under his contract of service.

[21] The learned chairman's reasoning is clear. The evidence that there was excessive medical leave is not in dispute. The learned chairman was of the view that mere excessive medical leave and other leave does not prove the charge of misconduct the claimant was charged with. Excessive medical leave was one ingredient of the charge. There is a second and more crucial ingredient which is required to be proved. The second ingredient is the sting of the charge, namely, the intention not to come to work and indicating an unwillingness to perform the claimant's duties under the contract of employment.

[22] The company submitted that the learned chairman committed an error of law by failing to consider the excessive medical leave. This is not correct. The learned chairman did consider that there was excessive medical leave but disagreed with the proposition that excessive medical leave by itself would demonstrate an intention of not coming to work and indicating an unwillingness to perform the claimant's duties under the contract of employment.

[23] An unwillingness which is inconsistent with the employee's obligations under the contract of employment. The learned chairman was of the view that the company had the burden to discharge by evidence the taking of the

excessive medical leave by the claimant was with the intention of not coming to work thereby indicating an unwillingness to perform his obligations under the contract of employment.

[24] I agree with the learned chairman. Something more must be shown apart from the mere fact of excessive medical leave. The second ingredient is the essence of the charge. The burden is on the employer to establish this second ingredient. It cannot be deemed from mere absenteeism arising from excessive medical leave. The failure to prove the second ingredient would not establish the misconduct the claimant was charged with.

[25] The company submitted that the following proposition appears in well-established authorities, 'excessive absence demonstrates an act or intention of not coming to work, which is consistent with an employee's terms and conditions of employment and further amounts to a form of misconduct' (see para 26 of the applicant's written submissions).

[26] I found that the authorities cited by the company is not the authority for the proposition proffered.

The first authority referred to is *Malaysia Smelting Corp Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Peleboran Logam, Butterworth* [1992] MLJU 108; [1992] 2 ILR 49. In this case, the charge was similar to the charge against the claimant. The Industrial Court there decided that the employee was wrongly dismissed for the misconduct of persistently taking excessive medical leave in 1982 to 1987 on the ground that absence with leave is not a misconduct and the charge of taking excessive medical leave is an unknown misconduct, it is unknown in common law, statutory or industrial law.

[27] The High Court, reviewing the decision in judicial review proceedings, quashed the decision of the Industrial Court holding as follows:

> With respect, in my opinion, the court has misdirected itself by misconstruing the charge when it deliberated only on the first ingredient. It failed entirely to give due and proper consideration to the second and crucial ingredient, namely, 'in order not to come to work and indicating unwillingness to perform your contractual duties and obligation which is contrary to the expected performance as per your contract of employment with the company'. The second ingredient is essential to the charge because when the charge is read as a whole it qualifies the first ingredient in that the reason for persistently taking excessive medical leave was not to come to work and indicative of his unwillingness to perform his duties under the contract of employment. Taking of excessive medical leave supported by authorised medical certificates may not be wrong in law or may not contravene the contract of employment. But, taking of excessive medical leave in order not to come to work and indicating unwillingness to perform his duties under the contract of service must surely amount to an improper conduct of a serious nature. It is a misconduct

which undermines the very basis of the employer-employee relationship, the spirit of the collective agreement, and industrial relations as a whole. Here lies the crux of the 'offence' of misconduct of the claimant. Misconduct simply means improper conduct (*The Shorter Oxford English Dictionary*).

[28] The decision in *Malaysia Smelting* in fact supports the decision of the learned chairman. The failure to consider the second ingredient resulted in the quashing of the Industrial Court's decision in *Malaysia Smelting*. In the instant case, the learned chairman clearly considered both the ingredients and, in detail, the second ingredient before arriving at the conclusion that the company had failed to discharge the burden of proving the second ingredient.

[29] The case of *International Sports Co Ltd v Thomson* [1980] IRLR 340 also does not support the company's assertion of the proposition. There, the employee persistently took medical leave for various minor illness. The employer had investigated the medical leave taken and gave the employee a number of warnings. When the employee persisted with taking medical leave he was dismissed. The Industrial Tribunal reversed the decision. The Employment Appeal Tribunal ('EAT') reversed the decision on appeal and upheld the dismissal. The following paragraph in the EAT's award is instructive:

> Where an employee has an unacceptable level of intermittent absences due to minor ailments, what is required is, firstly, that there should be a fair review by the employer of the attendance record and the reasons for it; and, secondly, appropriate warnings after the employee has been given an opportunity to make representations. If there is then no adequate improvement in the attendance record, in most cases, the employer will be justified in treating the persistent absences as a sufficient reason for dismissing the employee.

[30] As can be seen, the decision of each case turns on its own facts. Unlike *International Sports*, in the instant case, the illness was not minor. It was a major medical condition which resulted in a knee replacement operation that took some time to recover. I hold that *International Sports* is distinguishable on the facts and does not assist the claimant.

[31] Similarly, the case of *Rolls Royce Ltd v Walpole* [1980] IRLR 343 can also be distinguished. There, in the last three years of his employment, the employee's rates of absence were 44%, 55%, and 44%, and most of his absences were on account of medical reasons. The facts of the case show that the employee was counselled to discover the causes of his increasingly frequent absences and was given warnings. The employee was ultimately reminded of the earlier warnings when the absences continued and was warned of termination if the absences persisted. The employee went against his foreman's instructions to be present at his wife's confinement and subsequently suffered

an injury to his hand while playing rugby. The employer asked him to come back to do light work on a temporary basis, but he refused to do so. The employee then sustained another injury playing rugby, which extended his absence. The company had enough and dismissed him. The employee complained of unfair dismissal before the Industrial Tribunal.

[32] The Industrial Tribunal found the dismissal unfair on the ground that the employer should have obtained a more up-to-date medical report or given an opportunity to the employee to obtain medical evidence of his own. The EAT by a majority allowed the appeal of the company and substituted a finding of fair dismissal against the employee because of his poor attendance record. The EAT said that in cases where the employer does not satisfy the Industrial Tribunal that his response had been within that range of reasonable responses, that the Industrial Tribunal is enjoined by the statute to find that the dismissal of the relevant employee has been unfair.

[33] The EAT's decision (by majority) was in the following words (emphasis added):

> We think with all respect to the second Industrial Tribunal in the present case, that their decision that the employers had failed to satisfy them that their dismissal of the employee was fair in all the circumstances a 'perverse' one as that phrase is understood in law. In reaching it we are satisfied that the Industrial Tribunal must have misdirected itself on either the facts or the law, or both, in the present case, which were material in this particular case.

[34] The facts of *Rolls Royce Ltd* are poles apart from the instant case. The charge is not the same, the 'facts and circumstances' of the absenteeism were not the same, and the case was not decided on mere absenteeism. The case certainly is not authority for the proposition proffered by the company.

[35] The learned chairman identified the issue, directed himself properly on the law, and applied the law to the facts. He took into account relevant considerations for the determination of the issue. His decision is correct and in accordance with the law. For the above reasons, the learned chairman did not commit any error in law warranting interference by this court. The ground is devoid of merit.

The claimant's duties did not contribute to the knee operation

[36] The company submitted that the Industrial Court erred in law when it failed to consider the evidence that the claimant's duties did not contribute to his knee operation.

[37] I am of the view that the allegation of whether the claimant's knee condition was aggravated by the claimant's job function as Duty Manager — Passenger Services *is irrelevant* to the issue before the Industrial Court, that is to say, whether the charge was proven. The issue before the Industrial Court was whether the claimant had an intention not to come to work, thereby indicating unwillingness to perform his contractual duties and obligations as an employee. Nevertheless, and in any event, there was evidence before the learned chairman when Navindran Rasasingam (COW2), the company's Head of Passenger Services and Station Management at the material times and who was the claimant superior, had testified that:

> It can also be said that he walks most of the time as the nature of the work would depend on the number of specific issues or number of flights during his shift.

[38] The above testimony was, according to the learned chairman, prima facie evidence that the claimant was indeed naturally required to walk a lot in the performance of his duty as Duty Manager — Passenger Services and in the process had his knee condition aggravated. The learned chairman said that the company failed to accord the claimant with light duty despite being able in terms of resources to do so. The learned chairman said he was not convinced with the company's suggestion that the claimant had the entire discretion whether to walk or use the provided walkie-talkie whilst on duty. It follows that the company had failed in this issue.

[39] In the circumstances, the ground is devoid of merit.

The contract of employment was frustrated

[40] The issue of frustration of contract is not relevant to the question before the Industrial Court, which was whether the charge of misconduct was proven. As alluded to above, the sting of the charge was its second ingredient, ie, whether there was an intention not to come to work. The instant case had nothing to do with the allegation of the contract being frustrated.

[41] The issue of frustration is a stranger to the charge. The company is not permitted to raise a matter which was not the reason for dismissing the employee, and the Industrial Court is to determine whether the charge has been proven and not any other reason. The law was stated in *Goon Kwee Phoy v J&P Coats (M) Bhd* [1981] 2 MLJ 129; [1981] CLJU 30 as follows:

> Where representations are made and are referred to the Industrial court for enquiry, it is the duty of the court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason or excuse for the action taken by him, the duty of the Industrial Court will be to enquire whether that reason or excuse has or has not been made out. If it finds as a fact that it has not been proven, then the inevitable conclusion must be that the termination or

dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by the employer, and that court or the High Court cannot go into another reason not relied on by the employer or find one for him.

[42] The principle was reiterated in *Maritime Intelligence Sdn Bhd v Tan Ah Gek* [2021] MLJU 2189; [2021] 10 CLJ 663, where it was held as follows:

> This portion of the passage restricts the enquiry of the Industrial Court to the reasons given for the action taken by the employer. That can only mean the reasons operating on the mind of the employer preceding his decision to terminate the workman's services, which are usually specified in the letter of dismissal. This court in *Goon Kwee Phoy* (above) arrived at the same point as we did, in the earlier paragraphs of this judgment, far more pithily, but utilising the same rationale.

[43] That can only mean the reasons operating on the mind of the employer preceding his decision to terminate the workman's services, which are usually specified in the letter of dismissal. The letter of dismissal specified the finding of misconduct as per the charge as the reason for the dismissal of the claimant.

[44] On the other hand, where the contract of employment is frustrated, the contract is terminated by operation of law, and there is no issue of dismissal. The law is stated lucidly in *Harvey on Industrial Relations And Employment Law (Butterworths Series)* as follows:

> Where the contract of employment is frustrated, it is terminated by operation of law, and there is no dismissal under the statute. Consequently, the employee is unable to make a claim for unfair dismissal. If follows that in unfair dismissal cases, it benefits the employer to assert that the contract has been frustrated and for the employee to allege that it has not. The classic statement relating to the doctrine of frustration of contract is that of Lord Radcliffe in *Davies of Contractors Ltd v Fareham UDC* [1965] AC 696 at 725 where his Lordship said that frustration occurs when:
>
> > Without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance are called for would render it a thing radically different from that which was undertaken by the contract.
>
> A modern statement of the principle is found in Lord Brandon's speech in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 909:
>
> > There are two essential facts which must be present in order to frustrate a contract. The first essential factor is that there must be some outside or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting which either makes it impossible for the contract to be performed at all, or at least renders its performance something radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside event or extraneous change of situation concerned, and the consequences of either in relation to the performance of the

contract, must have occurred without the fault or the default of either party to the contract.

[45] Since the doctrine of frustration was not the reason in the letter of dismissal, the contention that the learned chairman erred in law by failing to consider that the contract of employment was frustrated is devoid of merit. The learned chairman carried out his functions as required of him under the law. He was only to consider the misconduct as per the charge and nothing else.

(a) the tribunal had asked itself the wrong questions; or

(b) the tribunal had misconstrued the terms of the statutory provision or agreement or misapplies or misstated a principle of general law.

The company was not aware when the claimant would return to work

[46] The company had contended that at the time of dismissing the claimant, it was not aware when the claimant would return to work. The learned chairman found this statement rebutted. The relevant paragraphs on the reasoning of the learned chairman is as follows:

> [49] It is pertinent to note that back on 15 October 2016, the company, vide email by COW1, had decided to turn down the claimant's request for light duty on the reason that 'the claimant's position was critical to the operation (COB2, p 3).
>
> [50] However, this court found that the company's position above is inconsistent as it runs foul with its own words in the same email. It was stated that '... the best alternative is to rest at home until your knee heal completely. Since you are on medical leave, the company will put another staff on acting'. From this email, this court is convinced that the company is fully aware of the claimant's knee condition; and that the company was able to provide an alternative officer acting on behalf of the claimant pending him heals completely, despite his critical role in the company. The evidence above effectively rebutted the contention that at the time of termination, the company did not even know when the claimant would be returning to work.

[47] I am of the view that the learned chairman's finding is one that no reasonable tribunal would arrive at. The learned chairman took into account an email that was four years old. However, since then, there is a change in circumstances where the claimant had undergone an operation and had indicated in his representation to the show cause letter that he had undergone total knee replacement and he was under physiotherapy, and would come back to work on the advice of his doctors, informed the much has happened since.

[48] The company was, therefore, aware of the latest medical condition of the claimant. The company did nothing to find out when the claimant could come back to work. The fault lies entirely on the company for failing to

ascertain when the applicant would be fit to return to work. Nevertheless, even if the finding is bad, it does not affect the failure of the company to prove the second ingredient of the charge. The finding of the learned chairman on the failure to discharge the burden of proof of establishing the second ingredient remains untouched.

CONCLUSION

[49] For the above reasons, I dismissed the judicial review application with costs.

Application for judicial review dismissed.

Reported by K Selvaraju